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IN THE

Supreme Court of United States

OCTOBER TERM, 1987

NO.

MARTINA STALLCOP,

Petitioner,

V.

KAISER PERMANENTE, ET AL.

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF

THE UNITED STATES

MARTINA STALLCOP,

PETITIONER

VS.

KAISER PERMANENTE, ET AL.

RESPONDENT.

IN THE SUPREME COURT OF UNITED STATES

PLAINTIFF/APPELLANT'S OPENING BRIEF

QUESTIONS PRESENTED FOR REVIEW:

ISSUE ONE: WAS PREEMPTION PROPERLY GRANTED?

ISSUE TWO: WAS PLAINTIFF'S CASE IMPROPERLY REMOVED TO DISTRICT COURT?

ISSUE THREE: WAS SUMMARY JUDGMENT IMPROPERLY GRANTED?

LIST OF INTERESTED PARTIES: (1) KAISER

FOUNDATION HOSPITALS; (2) THE PERMANENTE MEDICAL GROUP, INC.; (3) HOSPITAL AND INSTITUTIONAL WORKERS UNION, LOCAL 250; AND, (4) MARTINA STALLCOP

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SECTION 301 NLRA IN PASSIM

JURISDICTIONAL STATEMENT

Petitioner, by and through her attorneys submit the following as the basis for jurisdiction.

1. The date of the judgment sought to be reviewed was June 23, 1987.

2. Article III, Constitution of the United States.

a. Rule 17 (a), When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

3. The First Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Plaintiff [petitioner] worked at Kaiser Foundation Hospitals and the Permanente Medical Group [respondent] from November, 1971 to November, 1984 when she was finally terminated from employment for the second time by her employer, one of the defendants in this case. Plaintiff thereafter filed a complaint in the California Superior Court against the defendants alleging wrongful discharge against defendant Kaiser, fraud against defendant Kaiser, intentional infliction of mental distress against defendant Kaiser, negligent infliction of emotional distress against the same defendant, violation of civil rights and discrimination against defendant Kaiser, and breach of the duty of fair representation against defendant Union Local 250. A petition for removal to the United States District Court, Northern District of California was filed on December 20, 1985 and the case was thereafter removed to the United

States District Court. After answers were filed by the defendants, defendants Kaiser and Permanente filed a motion for summary judgment and defendant Union filed a motion for dismissal. The motion for summary judgment was granted on July 10, 1986, as was the motion for dismissal; this judgment of the lower court on July 10th resulted in alll six counts of the plaintiff's complaint being eliminated. The only discovery conducted before the defendants' motion for dismissal and summary judgment were granted was plaitiff's deposition being noticed and taken and a motion to produce documents filed by defendants. Timely appeal was filed by plaintiff on July 15, 1986 appealing the judgment granting defendants' motion for summary judgment and dismissal. On June 23, 1987, the lower court's decision was affirmed by the Ninth Circuit.

During the course of her employment, representatives of the defendant Kaiser stated to the

plaintiff that she would be given a reasonable amount of work. However, said promises were not carried out, and during her deposition and in her affidavits opposing summary judgment, the petitioner described how her supervisors made her work more difficult than before. Her affidavits alleged a conspiracy between her supervisor and the supervisor of another department, and other facts indicate flagrant violation of the promises made to her.

The District Court granted summary judgment based on the testimony of the plaintiff at her deposition noticed by the defendants and the affidavits of the defendants. The plaintiff was inadequately prepared by her previous lawyers, and did not conduct discovery on her own behalf. Nevertheless, the District court granted summary judgment and the Court of Appeals affirmed.

THE DISTRICT COURT'S REMOVAL JURISDICTION WAS PREMISED UPON 28 U.S.C. Section 1441(a)

ARGUMENT ONE: PLAINTIFF'S STATE CAUSES SHOULD NOT BE BARRED BY THE DOCTRINE OF PRE-EMPTION

Congress' power to pre-empt state law is derived from the Supremacy Clause of Article VI of the Federal Constitution. *Allis-Chalmers v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1909 (1985) Congress has never exercised authority to occupy the entire field in the area of labor legislation, nor has it explicitly stated whether and to what extent it intended Section 301 of the LMRA to pre-empt state law. The courts sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States. Furthermore, the Court has refused to hold state

remedies pre-empted where the activity regulated was merely a peripheral concern of the LMRA or where the state remedies touched interests "so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, the Court could not infer that Congress has deprived the States of the power to Act." Id., 386 U.S. 171, 180-181.

Allis Chalmers reiterated the rationale behind the doctrine of pre-emption in the 301 context that substantive principles of federal labor law must be uniform due to the possibility that individual contract terms might have different meanings under state and federal law and would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. *Allis-Chalmers v. Lueck,* supra, 105 S.Ct. 1904, 1910. See *Textile Workers v. Lincoln Mill*, 353 U.S. 448, *Teamsters v. Lucas Flour*

Co. 369 U.S. 95. The Court in *Allis- Chalmers* pre-empted Wisconsin law and held that when the resolution of a state-law claim isubstantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a Section 301 claim or dismissed as pre-empted by federal labor contract law. Id., 105 S.Ct. 1904,1916. However, the Court held that not every state law suit relating in some way to a provision in a collective-bargaining agreement is preempted by Section 301. Id.

In the instant case, California's wrongful termination law, as relied upon by the Petitioner, does not depend on the interpretation of any contract. "As Professor Prosser has explained: (Whereas) (c) ontract actions are created to protect the interest in having promises

performed','(t)ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law and are based primarily upon social policy and not necessarily upon the will or intention of the parties..." (Prosser, Law of Torts (4th ed. 1971) p. 613". *Tameny v. Atlantic Richfield Co.,* 27 Cal.3d 167, 175-176 Unlike a contract action, a wrongful discharge suit exhibits the classic elements of a tort cause of action. Id.,at 176.

California's wrongful termination law does not conflict with, or interefere with Federal Labor policy where there has been an (1) alleged breach of the collective bargaining agreement by the employer,(2) a breach of the duty of fair representation by the union, and (3) the termination does not involve the interpretation of the collective bargaining agreement. Lincoln Mills, Lucas Flour, and Allis Chalmers were

primarily concerned with interpretation of a collective bargaining agreement under possible conflicting state rules of contract law. The analysis of these three cases does not apply in the situation where there has already been a breach of a collective bargaining agreement, the employee has attempted to use the grievance process but was unsuccessful due to a breach of the duty of fair representation and the statute of limitations has passed under Section 301. In this situation the employee falls outside the parameters of federal law and would be left without any remedy but for rights which are available under State law.

The Court below applied the doctrine of pre-emption without extensive analysis concerning the Petitioner's right under the First Amendment to bring a state cause of action in state court. The right of access to the courts is an aspect of the First Amendment Right to petition the

government for redress of grievances. *Bill Johnson's Restaurants, inc., v. NLRB* ,461 U.S. 731, 741, 103 S.Ct. 2161, 2169 (1983) citing *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508,510, 92 S.Ct. 609,611, 30 L.Ed.2d 642 (1972).

In the *Bill Johnson's* case, the NLRB issued a cease and desist order to halt the prosecution of a state court civil suit brought by an employer against employees exercising their federally protected labor rights. The suit was filed in State Court even though the employee had filed an unfair labor practice charge against the employer petitioner at least one month before. The Supreme Court stated that while Sections 8(a)(1) and (4) of the NLRA are broad and the Court has liberally construed these laws, 461 U.S. 731, 740, there were weighty countervailing considerations which prohibited the Board from enjoining the State Court suit,

namely the right under the First Amendment to have access to the Courts and to petition the government for redress of grievances. Id., at 741. The Supreme Court stated further, that in recognition of the State's compelling interest in the maintenence of domestic peace, the Court has construed the Act."...as not pre-empting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'". Id. at 741-742 citing *San Diego Building Trades Council v. Garmon,* 359 U.S. 236,244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959); *Bill Johnson's*, supra, 461 U.S. at 741-742,103 S.Ct. 2161, 2169, citing *Farmer v. Carpenters,* supra, 430 U.S. 302-303; *Sears Roebuck & Co. v. Carpenters* 436 U.S., at 196, 98 S.Ct., at 1757; *Linn,* supra, 383 U.S. , at 61, 86 S.Ct., at 662. It cannot be overemphasized that

the states' interest in protecting the health and well being of its citizens is triggered when a state citizen chooses to bring suit in a state court on state theories of action. See *Bill Johnson's Restaurants Inc., v. NLRB* supra, 461 U.S. 731-741-742. Furthermore, California's wrongful termination law is "deeply rooted in local feeling and responsibility." Id., at 741-742.

Therefore, the Petitioner respectfully submits that the Court of Appeals' ruling was erroneous.

ARGUMENT TWO: REMOVAL WAS IMPROPER AND THE DISTRICT COURT HAD NO JURISDICTION

A suit may be removed to federal court under 28 U.S.C. Section 1441 (a) only if it could have been brought there originally. Federal district courts are granted original jurisdiction under 28 U.S.C. Section 1331 over all civil actions "arising under the Constitution, laws, or treaties of the United States." An action "arises under" federal law only if "resolution of the federal question must play a significant role in the proceedings". Under the "well-pleaded complaint" rule, the federal question must appear from the complaint and not from any defense the defendant might raise to defeat the cause of action. *Williams v. Caterpillar Tractor Co.* 786 F.2d 928,930-931 (9 Cir. 1986), affirmed No. 85-2724,June 9, 1987; see *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 10, 103 S.Ct.

2841, 2846 (1983). A corollary of the "well-pleaded complaint" rule is the master of the complaint rule, which is based on the proposition that the plaintiff " is free to ignore the federal question and pitch his claim on the state ground." *Hunter v. United Van Lines* ,746 F.2d 635, 642 (9th Cir. 1984), cert. denied, 106 S.Ct. 180, 88 L.Ed.2d 150 (1985) The artful pleading doctrine, on the other hand, allows courts under some circumstances to recharacterize a plaintiff's state law claim as a federal claim. However, the artful pleading doctrine is the exception rather than the rule. *Hunter v. United Van Lines* , supra, 746 F.2d 635,641-642.

Based upon the analysis set forth in *Williams, Hunter,* and *Allis-Chalmers,* the petitioner's state causes of action do not involve a federal element or federal claim sufficient to confer original jurisdiction

on the district court below. First, the state cause of action is not based upon an interpretation of the collective bargaining agreement, but is rather an independent, non-negotiable tort. Second, the plaintiff attempted to exhaust her remedies under the contract and is now barred by the statute of limitations, which means that she is left without any remedy whatsoever. There is no evidence that she fraudulently avoided bringing a federal cause of action. Third, the state court would not be hostile to federal claims, and is capable of adjudicating a pendent state cause of action. Fourth, the doctrine of preemption has been raised by way of defense only. Removal was therefore improper, and the district court below did not have jurisdiction to enter its order granting summary judgment.

ARGUMENT 3: THE DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT IN LIGHT OF THE NATURE OF PLAINTIFF'S CLAIMS

Summary judgment was granted before petitioner had the opportunity to conduct discovery by deposition or otherwise. The standard governing decisions on summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is clear:

"Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case show that ... is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 467, 82 S. Ct. 486, 488, 7 L.Ed.2d 458 (1962); see *Katz v. Goodyear Tire and Rubber Co.*, 737 F.2d 238,

244 (2d Cir. 1984); *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F. 2d 1030, 1033 (9th Cir. 1983); *Brown v. Trans World Airlines, Inc.*, 746 F.2d 1354, 1358 (8th Cir. 1984); *Northrup Corp. v. McDonnell Douglas Corp.*, 705 F. 2d 1030, 1050 (9th Cir. 1983).

Granting a summary judgment motion is an "extreme remedy" which should be granted only when the moving party has established his right to judgment with such clarity as to leave no room for controversy that the other party is not entiltled to recover under any discernable circumstances. *Mandel v. United States*, 719 F.2d 963 965 (8th Cir. 1983); *Partis v. Folk Construction Co., Inc.*, 694 F.2d 520, 522 (8th Cir. 1982). Thus, the district court is supposed to resolve any doubts regarding the existence of genuine issues of fact and any ambiguities against the moving party.

Addickes v. S.H. Kress & Co., 398 U. S. 144, 158-59, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962).

The motion for summary judgment is not intended as a substitute for trial but should be resortedto only when it is "clear what the truth is [and] no genuine issue remains for trial. *Sartor v. Arkansas Natural Gas*, 321 U. S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944);see *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180 (8th Cir. 1976). Indeed, even if summary judgment might be technically proper the trial court has the discretion to deny the motion and permit the case to be developed at trial since the "ultimate rights of the movant can always be protected in the course of or even after trial". *Olberding v. United States Dept. of Def., Dept. of*

the Army, 564 F. Supp. 907, 909 n.1 (S. D. Ia. 1982), *affirmed*, 709 F.2d 621 (8th Cir. 1983).

Applying these principles to facts of the instant case, petitioner submits that the lower courts decisions granting and affirming summary judgment were clearly erroneous. In cases where intent or good faith is involved the courts have consistently found that summary judgment is suitable only in unusual or extreme situations. See,e.g., *White Motor Co. v. United States*, 372 U. S. 253, 259, 83 S. Ct. 696, 9 L. Ed.2d 738 (1963);*Louis Schlesinger Co. v. Kresge Foundation*, 388 F. 2d 208, 212 (3d Cir.), cert. denied, 391 U. S. 934, 88 S. Ct. 1847, 20 L. Ed.2d 854 (1968); *Northrop v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir 1983); *Alioto v. United States*, 593 F. Supp. 1402, 1411 (N.D. Ca. 1984); *United States v. Langley*, 587 F. Supp. 1258, 1261 (E. D. Ca. 1984).

In the instant case, plaintiff broached allegations of bad faith by the union because she had petitioned for the other union representative to replace Ms. Majors and because the union representative did not exert a fair effort on her grievance and did not listen to the facts plaintiff gave her to support plaintiff's claims. In addition, plaintiff testified to and set forth bad faith and intentional misrepresentation by her employer with respect to promises for more reasonable work after re-instatement. "[W]e must draw all inferences in favor of appellant; summary judgment is improper in the present case where appellant raises an inference as to appellee's improper motivation in refusing to arbitrate his discharge. Although appellant may not be able to produce enough evidence to carry his burden at trial, he should not be prevented from trying to do so by a premature termination of his claim on summary

judgment." *Hughes v. International Broth. of Teamsters, Local 683*, 554 F. 2d 365, 367 (9th Cir. 1977); see *Baldini v. Local U. No. 1095, Intern. U. Etc.*, 581 F.2d 145, 151-52 (9th Cir. 1978).

A similar result should obtain with respect to plaintiff's wrongful termination and fraud contentions. These contentions devolve to a claim that the company made promises it did not intend to keep and that it forced plaintiff to do overtime by making her do more work than could be completed in a regular work. In a case where the employee indicated that " if I come to [the employer] under a permanent arrangement . . . I'm entitled to stay on unless the circumstances within the company have changed so that either they have a right to get rid of me or I have a right to get rid of them" and that despite the fact that no assurances were made for a fixed period of time --very similar to the testimony in

this case--, the trial court was precluded from granting summary judgment on the issue of wrongful termination. *Hodge v. Evans Financial Corp.*, 707 F.2d 1566, 1567, 1569-70, 228 U. S. App. D. C. 1427 (D.C. Cir. 1983).

Similarly, in *Wagner v. Sperry Univac, Div. of Sperry Rand Corp.*, 458 F. Supp. 505, 519-21, the court held that while plaintiff's evidence of an implied contract with his employer was "hardly compelling", it was sufficient to preclude the entry of summary judgment. Plainitiff submits that plaintiff's deposition and affidavits establish conflicting factual issues sufficient to make the District Court's ruling clearly erroneous. As at least one court has pointed out in this area, a plaintiff in a discriminatory discharge case can rarely, if ever, point to a "smoking gun" that provides direct, subjective evidence of an employer's intent and reiterates the principle that in cases where the state of

mind of one of the parties is crucial to the outcome of the case the courts are particularly cautious about granting summary judgment. *Stepanischen v. Merchants Despatch Transp. Co.*, supra, 722 F. 2d at 928, 929 *and cases cited therein*.

Finally, plaintiff submits that granting summary judgment was clearly inappropriate because at "trial, with its opportunity for cross-examination and testing the credibility of witnesses, might disclose a picture substantially different from that given by the affidavits." *United States v. Perry*, 431 F.2d 1020, 1023 (9th Cir. 1970); see *Jorman v. Veterans Administration* , 579 F. Supp. 1407 (N. D. Ill. 1984). In this case where so much depends upon the parties intent and credibilty it was improper to grant summary judgment. Furthermore, in this case where the defendant has not had an opportunity to conduct any

discovery the lower court's judgment was clearly erroneous. See *Grove v. Mead School Dist. No. 354*, 753 F.2d 1529 (9th Cir. 1985); *Amey Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (5th Cir. 1985).

CONCLUSION

In conclusion, the Petitioner's State cause of action should not have been pre-empted and summary judgment should not have been granted.

DATE: 7-18-87

Segundo Cy Unpingco, Esq.
David A. Mair, Esq.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A COPY OF THE WRIT OF CERTIORARI WAS MAILED TO THE FOLLOWING:

Van Boor, Weinberg Roger & Rosenfeld
875 Battery St. 3d floor
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Schacter, Kristoff, Ross et al
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The aforementioned document was mailed on 2-10-82 ______________. Executed under penalty of perjury.

DATE: [illegible]

Grove M. Callison

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STAMATINA STALLCOP,
Plaintiff-Appellant,
v.
KAISER FOUNDATION HOSPITALS; THE PERMANENTE MEDICAL GROUP, INC.; HOSPITAL & INSTITUTIONAL WORKERS UNION, LOCAL 250,
Defendant-Appellee.

No. 86-2343
D.C. No.
CV-85-9293-MHP
OPINION

Argued and Submitted
April 14, 1987—San Francisco, California

Filed June 23, 1987

Before: Procter Hug, Jr., Dorothy W. Nelson and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Hug

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

SUMMARY

Courts and Procedure/Employment Discrimination/Statutes of Limitation

Appeal from dismissal and grant of summary judgment. Affirmed.

Appellant Stallcop filed a complaint in state court against appellee Kaiser Foundation Hospitals (Kaiser), her former employers, alleging wrongful discharge, fraudulent misrepresentation, intentional and negligent infliction of emotional distress, and violations of California equal employment laws. She also alleged a cause of action against her former union for breach of the duty of fair representation. Following removal to federal district court, Stallcop's claim against the union was dismissed and Kaiser's motion for summary judgment on the remaining claims was granted.

Stallcop was a member of a union which had an exclusive collective bargaining agreement with Kaiser. After being terminated and reinstated, Stallcop was terminated a second time. The union represented her through Step 3 of the grievance procedure after which the union stated it would proceed no further with her case.

[1] Stallcop alleges that the Union breached its duty of fair representation by failing to represent her interest properly in the grievance procedure. This action against the Union is based on federal labor law and the federal court would have had original jurisdiction over Stallcop's suit. **[2]** Stallcop contends that the wrongful termination alleged does not involve the interpretation of the collective bargaining agreement. However, any independent agreement of employment could be effective only as part of the collective bargaining agreement. **[3]** Stallcop also attempts to rely on the California tort of wrongful discharge. Her complaint does not plead such an action. Even if it did, the tort is preempted. **[4]** The cause of action for fraud is based upon representations Kaiser made in connection with the reinstatement agreement. As such, the fraud action depends upon an interpretation of the collective bargaining agreement, and is preempted by section 301 of the Labor Management Relations Act. **[5]** Stallcop's actions for intentional and negligent infliction of emotional distress grow out of her discharge. Disciplinary actions and letters of warning are governed by the collective bargaining agreement. Res-

olution of her claims therefore necessarily entails examination and interpretation of the agreement, and these claims are also preempted. **[6]** Stallcop's claims are a hybrid section 301 and fair representation claim. The six-month statute of limitations for making unfair labor practice charges under the NLRA is applicable. Her complaint is time-barred. **[7]** The record indicates that the district court correctly held that there was no factual basis for applying equitable modification to the limitations period in this case. **[8]** Stallcop argues that it was improper for the district court to grant summary judgment on her national origin discrimination claim; however, she presents no specific facts which would support a prima facie case. **[9]** Because Stallcop has not exhausted her state administrative remedies, her claim of sex and age discrimination was improper. **[10]** Sanctions are not appropriate in this case because the law concerning the preemption of wrongful discharge claims is still developing.

COUNSEL

Segundo Unpingco, San Jose, California, for the plaintiff-appellant.

Morton H. Orenstein, Allen M. Kato, and Stewart Weinberg, San Francisco, California, for defendants-appellees.

OPINION

HUG, Circuit Judge:

Stallcop filed a complaint in state court against Kaiser Foundation Hospitals and Permanente Medical Group ("Kaiser"), her former employers, alleging wrongful discharge, fraudulent misrepresentation, intentional and negligent infliction of emotional distress, and violations of

California equal employment laws. She also alleged a cause of action against her former union for breach of the duty of fair representation.

Following removal to federal district court, Stallcop's claim against the union was dismissed and Kaiser's motion for summary judgment on the remaining claims was granted. The district court found that all of Stallcop's claims, except that of violation of California equal employment laws, were preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1982). The district court then found that the relevant six-month statute of limitations had run on these section 301 claims, and that this time bar was not overcome by equitable considerations. Stallcop's age and sex discrimination claims under California law were dismissed for failure to exhaust administrative remedies. Summary judgment was granted to Kaiser on Stallcop's national origin claim because she failed to establish a prima facie case.

The issues we address are: (1) whether the case was properly removed to federal court; (2) whether the wrongful discharge, fraudulent misrepresentation, and emotional distress claims are preempted by section 301; (3) whether the statute of limitations should be equitably modified; and (4) whether granting summary judgment to the defendants on the California discrimination claims was proper.

We affirm the district court's judgment.

I.

FACTS

Throughout her employment with Kaiser, Stallcop was a member of the Hospital & Institutional Workers Union, Local 250 ("the Union"), which had an exclusive collective bargaining agreement with Kaiser.

Stallcop was first terminated on May 7, 1984, after receiving three letters of warning from her supervisor concerning poor work performance. She was reinstated on July 11, 1984 pursuant to a reinstatement agreement negotiated between her, the Union, and Kaiser. This written agreement required Stallcop to show "substantial improvement" in her work.

After her reinstatement, Stallcop again received notices of her inadequate job performance. Stallcop alleges that she was assigned additional work responsibilities in violation of an oral agreement in connection with the written reinstatement agreement. Stallcop was then terminated a second time on November 27, 1984, for unsatisfactory work performance.

Stallcop again challenged her termination. The Union represented her through Step 3 of the grievance procedure. On March 12, 1985, the Union sent Stallcop a letter telling her it would proceed no further with her case. Stallcop alleges that DeMello, a union business representative, told her she had one year in which to sue.

On March 22, 1985, Stallcop filed a complaint against the Union and Kaiser with the NLRB. It was denied April 15, 1985. On April 8, 1985, Stallcop filed a discrimination charge against Kaiser with the California Department of Fair Employment and Housing ("DFEH"), alleging she was terminated due to her Greek national origin. In August 1985, Stallcop received a "Notice of Closure" from the DFEH, informing her that the allegation of discrimination could not be sustained, and giving her notice of the right to sue.

In August 1985, Stallcop alleges she consulted with three different lawyers, all of whom told her the relevant statute of limitations was one year. She later consulted with other lawyers, and filed her complaint in state court on November 27, 1985. On December 20, 1985, Kaiser and the Union removed the action to federal district court.

II.

REMOVAL JURISDICTION

Since Stallcop did not object to removal to the district court, the relevant question is "not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1972)(quoted in *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 666 n.1 (9th Cir. 1985)). The standard of review is therefore *de novo*. *Mobile Oil Corp. v. City of Long Beach*, 772 F.2d 534, 538 (9th Cir. 1985).

[1] Federal district courts have original jurisdiction in all civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982). On the face of the complaint, Stallcop alleges that the Union breached its duty of fair representation by failing to represent her interests properly in the grievance procedure. This action against the Union for breach of the duty of fair representation must be based on federal labor law, section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (1982). *Vaca v. Sipes*, 386 U.S. 171, 177-78 (1967). Since the action "arises under" a federal law, the federal court would have had original jurisdiction over Stallcop's suit.

III.

PREEMPTION UNDER SECTION 301

Whether preemption was proper is a question of subject matter jurisdiction, reviewable *de novo*. *Mobile Oil Corp.*, 772 F.2d at 538.

Stallcop's first four causes of action appear on their face to present only state law claims—wrongful discharge, fraudulent misrepresentation, and intentional and negligent inflic-

tion of emotional distress. The district court found, however, that federal jurisdiction existed because these claims were preempted by section 301 of the LMRA.[1]

The preemptive force of section 301 is so powerful as to displace entirely any state cause of action for violation of a collective bargaining agreement.[2] *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1982); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980). All that is required for a cause of action to exist under section 301 is that the suit be based on an alleged breach of contract between an employer and a labor organization and that the resolution of the lawsuit be focused upon and governed by the terms of the contract. *Painting and Decorating Contractors Ass'n v. Painters and Decorators Joint Comm.*, 707 F.2d 1067, 1071 (9th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984), *cited in Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 935 (9th Cir.), *cert. granted*, 107 S. Ct. 455 (1986).

A. *Wrongful Discharge*

Stallcop's first cause of action is for wrongful discharge in

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[1] Section 301 of the LMRA, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or with out regard to the citizenship of the parties.

[2] Stallcop contends that her claims could not be preempted because no federal remedy exists for her grievances, since they are barred by the statute of limitations. This argument is misdirected. The point is that federal law would provide her a remedy, had she complied with its procedural requirements. It would be anomalous to allow the preemption of actions based upon section 301 for the first six months after the action accrued, but prevent such preemption after that time. *Cf. Harper*, 764 F.2d at 669 (complaint construed under "artful pleading" doctrine as arising under section 301, then held to be time-barred under *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 155 (1983)).

violation of her employment agreement and of her oral agreement with Kaiser when she was reinstated after her initial discharge. Stallcop's complaint does not reveal that her employment is governed by a collective bargaining agreement, but this is not dispositive under the "artful pleading" doctrine. Under this doctrine, the court may investigate the true nature of the plaintiff's allegations; if the complaint actually raises a section 301 claim on the collective bargaining agreement, even though it is framed under state law, the claim is preempted. *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1473 (9th Cir. 1984), *cited in Williams*, 786 F.2d at 931 n.1. Stallcop was, in fact, subject to a collective bargaining agreement, and the claim based upon it is preempted by section 301. *See Franchise Tax Board*, 463 U.S. at 23; *Fristoe*, 615 F.2d at 1212.

[2] Stallcop contends that the wrongful termination alleged does not involve the interpretation of the collective bargaining agreement. Although the argument is not clearly made, she apparently contends that she was wrongfully discharged in violation of the oral agreement in connection with her reinstatement, and that this agreement is not part of the collective bargaining agreement. However, "any independent agreement of employment could be effective only as part of the collective bargaining agreement." *Olguin*, 740 F.2d at 1474. *Accord Bale v. General Telephone Co. of California*, 795 F.2d 775, 779 (9th Cir. 1986); *cf. Williams*, 786 F.2d at 935-36 & n.6 (contract involved was entered into outside of the collective bargaining unit).

[3] Stallcop also attempts to rely on the California tort of wrongful discharge. Her complaint does not plead such an action. Furthermore, even if it did, the tort is preempted as well. The collective bargaining agreement guarantees the employer will discipline employees only upon just cause. Art. XXIX § 211. Thus, the agreement appears to provide "the same or greater protection of job security that state tort law seeks to provide for nonunionized employees; accordingly

federal law preempts state law." *Olguin,* 740 F.2d at 1474. *See also Harper,* 764 F.2d at 668-69 (since the job security is the same, federal preemption jeopardizes no independent state right).

B. *Other Causes of Action*

[4] Stallcop's cause of action for fraud is based upon representations Kaiser made in connection with the reinstatement agreement. As such, the fraud action depends upon an interpretation of the collective bargaining agreement, and is preempted by section 301.[3] *Bale,* 795 F.2d at 779-80; *Fristoe,* 615 F.2d at 1211-12.

[5] Stallcop's actions for intentional and negligent infliction of emotional distress grow out of her discharge. Her complaint details her receipt of letters of warning, her discharge and reinstatement, and her final discharge. Disciplinary actions and letters of warning are governed by the collective bargaining agreement. Resolution of her claims therefore necessarily entails examination and interpretation of the agreement, and these claims are also preempted. *Carter v. Smith Food King,* 765 F.2d 916, 921 (9th Cir. 1985); *Olguin,* 740 F.2d at 1475-76; *cf. Tellez v. Pacific Gas & Electric,* No. 85-2774, slip op. at 9 (9th Cir. May 15, 1987)(actions for intentional and negligent infliction of emotional distress not preempted since they arose from conduct not covered by the collective bargaining agreement); *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367, 1369 n.4 (9th Cir. 1984) (same), *cert. denied,* 471 U.S. 1099 (1986).

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[3] Stallcop also admitted in deposition that all of her claims, except for discrimination, essentially stem from the collective bargaining agreement.

C. *Once Preempted, Summary Judgment was Properly Granted Because the Claims were Time-barred.*

[6] Stallcop's claims are a hybrid section 301 and fair representation claim. The six-month statute of limitations for making unfair labor practice charges under the NLRA is applicable to such claims. *DelCostello*, 462 U.S. at 169-70. Stallcop's claims accrued in March 1985 when she received the Union's letter notifying her it would pursue her grievance no further. *Carter*, 765 F.2d at 919 n.2. Since her complaint was not filed until November 1985, over eight months later, it is time-barred.[4]

IV.

EQUITABLE MODIFICATION OF THE STATUTE OF LIMITATIONS

Stallcop argues that the statute of limitations should be equitably modified in this case. Such modification is applicable to the type of hybrid action present here. *See DelCostello*,

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[4] Stallcop argues that it was inappropriate to bar her claims because they involved questions of intent or good faith, and summary judgment is rarely applicable in such situations. *See, e.g.*, *White Motor Co. v. United States*, 372 U.S. 253, 259 (1963). This argument is meritless. The content of her claims is immaterial to the district court's decision that they are procedurally barred.

Stallcop also argues that the preemption of her state law claims and the granting of summary judgment destroyed her right of access to the courts, relying on *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). In *Bill Johnson*, the Supreme Court held that the NLRB may not halt the prosecution of a state court lawsuit unless the suit lacks a reasonable basis in law or fact, and has been instituted out of a retaliatory motive. *Id.* at 748-49.

Bill Johnson is obviously inapposite to the present case. Stallcop's case was not ordered withdrawn, totally preventing her access to the court. Her case was simply transferred to another court, where, partially on procedural grounds and partially on the merits, summary judgment was granted.

462 U.S. at 172 (case remanded for district court to consider equitable tolling arguments). She believes modification is appropriate here because (1) she was not notified by the Union, Kaiser, the NLRB, or the three lawyers she originally consulted that there was a six-month statute of limitations, and (2) DeMello, a union business representative, told her she had one year in which to file suit and she reasonably relied on his representation. Stallcop's first basis cannot provide relief since none of the parties had a duty to inform her of the statute of limitations.[5] Her second contention, however, could possibly toll the limitations period.

There are two types of equitable modification, equitable tolling and equitable estoppel. Equitable tolling requires that Stallcop was excusably ignorant of the limitations period. *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981). Stallcop admitted that she consulted three lawyers within the six-month statutory period. She therefore gained the "means of knowledge" of her rights and can be charged with constructive knowledge of the law's requirements. *See Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975). Equitable estoppel focuses on the defendant's actions. There must be evidence of an improper purpose by the defendant, or of the defendant's actual or constructive knowledge that its conduct was deceptive. *Naton*, 649 F.2d at 696. Stallcop failed to provide this evidence. She also concedes that DeMello's alleged misrepresentations were not intentionally or fraudulently made, and the district court relied on this concession to hold there was no basis for the application of equitable estoppel.

[7] Therefore, the district court correctly held that there

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[5] Stallcop alleges that Kaiser, the Union, and the NLRB violated her due process rights by not notifying her about the statute of limitations. She raised this claim in the district court in her response to Kaiser's motion for summary judgment, but never raised it as a cause of action. Therefore, it is inappropriate for us to consider this claim.

was no factual basis for applying equitable modification to the limitations period in this case.

V.

SUMMARY JUDGMENT OF DISCRIMINATION CLAIMS

The district court granted summary judgment against Stallcop's claim of national origin discrimination for failure to establish a prima facie case. Stallcop's claim of sex and age discrimination under California law was dismissed because she had not exhausted her state administrative remedies. This decision should be treated as a grant of a motion for summary judgment, since matters outside the pleading were presented to, and considered by, the court. Fed. R. Civ. P. 12(b).

A grant of summary judgment is reviewed *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). The appellate court must determine, viewing the evidence in the light most favorable to the moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

[8] Stallcop argues that it was improper for the district court to grant summary judgment on her national origin discrimination claim. She presents no specific facts, however, which would support a prima facie case. A party opposing a motion for summary judgment must produce "*specific* facts showing that there remains a genuine factual issue for trial." *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (quoting *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980)). Stallcop relied entirely on a supervisor's statement, a year or two prior to her terminations, that she did not "know the English language," as proof of Kaiser's discriminatory conduct. As

the district court noted, ethnicity and status as a non-English speaking person are not necessarily linked. Furthermore, derogatory ethnic statements, unless excessive and opprobrious, are insufficient to establish a case of national origin discrimination. *See Hill v. K-Mart Corp.*, 699 F.2d 776, 778 (5th Cir. 1983); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977).

[9] Stallcop contends that her failure to use the specific words "age" and "sex" should not preclude her action based on age and sex discrimination. She relies on *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). In *Sanchez*, the Fifth Circuit held that the scope of a civil action is limited to the scope of the EEOC complaint and investigation. *Id.* at 465-66. Stallcop contends that she told the DFEH investigator the totality of her employment problems at Kaiser. However, the charge Stallcop actually filed with the DFEH does not include any allegations of sex or age discrimination. Therefore, the DFEH obviously would have investigated only national origin discrimination Thus, *Sanchez* is not controlling. As the district court held, Stallcop has not exhausted her state administrative remedies, and her action was therefore improper. Cal. Gov't Code § 12965(b) (West Supp. 1987); *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal.3d 211, 214, 185 Cal. Rptr. 270, 273 (1982).

VI.

SANCTIONS

[10] Kaiser has requested that the court award double costs and/or attorneys' fees as a sanction for frivolous appeal. Fed. R. App. P. 38; 28 U.S.C. § 1912 (1982). Sanctions are not appropriate in this case because the law concerning the preemption of wrongful discharge claims is still developing, as evidenced by the Supreme Court's grant of certiorari in *Williams v. Caterpillar Tractor Co.*, 107 S. Ct. 455 (1986).

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STAMATINA STALLCOP,)
Plaintiff,) No. C-85-9293 MPH
v.) ORDER GRANTING
KAISER FOUNDATION HOSPITALS,) MOTION TO DISMISS
THE PERMANENTE MEDICAL GROUP) AND/OR FOR
INC., HOSPITAL & INSTITUTIONAL) SUMMARY JUDG-
WORKERS UNION, LOCAL 250,) MENT
Defendants.)
_______________________________)

Plaintiff brings this action against her former employer, Kaiser Foundation Hospitals, Inc., ("KFH") and her former union, Hopspitals & Institutional Workers Union Local 250 ("Local 250"). She alleges the following contract and tort actions-- wrongful discharge,

fraudulent misrepresentation, intentional and negligent infliction of emotional distress, breach of duty of fair representation, and violation of California equal employment laws. Defendant KFH has moved for summary judgment, arguing (1) that except for the discrimination charge plaintiff's claim are preempted by and constitute a single cause of action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, (2) that plaintiff's claim are barred by the statute of limitations, and (3) that plaintiff fails to state a claim for violation of California equal emplyment laws. Defendant Local 250 has filed a motion for dismissal based soley upon that stautue of limitations.

Background

From 1971 to 1982 plaintiff was employed by the Permanente Medical Group, Inc., as a clerk receptionist. In May 1982 plaintiff requested and received a transfer

to a clerical position with defendant KFH, which is affiliated with the Permanente Medical Group. Between October and February 1984 plaintiff received three letters of warning from her supervisor concerning her failure to perform work as required. On May 7, 1984, plaintiff was terminated . She filed a grievance challenging this termination through her union, defendant Local 250, which had an exclusive collective bargaining agreement with KFH. The union representative representing the plaintiff was Mr. DeMello. During the course of the grievance proceedings, the union, KFH, and the plaintiff negotiated a settlement which resulted in plaintiff's reinstatement. The reinstatement agreement required plaintiff to show "substantial improvement" in her work. On July 11, 1984, she returned to work in her previous position, and her termination was converted into a disciplinary suspension without pay.

Plaintiff alleges that, once reinstated, she was

assigned additional work responsibilities in violation of the reinstatement agreement. Plaintiff's Dec. # 11. From July 1984 to November 1984, she again received notice from her supervisor concerning her inadequate job performance. Plaintiff was terminated a second time on November 27, 1984. According to defendant KFH , she had failed to amke "marked and substantial improvement" and continued to "exhibit unsatisfactory job performance." Veldman Dec. at 2. Plaintiff also challenged this second termination through the union grievance procedure. This time, however, she had a different union representative, Ms. Marilyn Majors. Plaintiff contends Ms. Majors failed to press her grievance forcefully because plaintiff headed an unsuccessful effort to retain Mr. DeMello, Majors' predecessor, as union representative. Plaintiff's Dec. # 8. After various meetings with employer KFH, Ms. Majors wrote plaintiff a letter dated March 12, 1985, in which she notified plaintiff that the union had decided

not to proceed further with her case. Plaintiff admits she knew when she received this letter that the union was not going to take her case to arbitration. Plaintiff's Dep. at 79.

On March 22, 1985, plaintiff filed a complaint against the union and company with the National Relations Board. It was denied on April 15, 1985. On April 8, 1985, plaintiff filed a discrimination charge against KFH with the California Department of Fair Employment and Housing ("DFEH"), alleging that her employment was terminated because of her Greek national origin. Plaintiff did not tell the DFEH that KFH discriminated against her because of her sex or age, leaving the boxes assigned for sex and age discrimination blank on the form she filed. In August 1985 plaintiff received a "Notice of Case Closure" letter from the DEFH, informing her that the "allegation of discrimination cannot be sustained," and giving a notice of right to sue.

In August 1985 plaintiff also consulted with three attorneys, none of whom apparently informed her of the statute of limitations applicable to her case. In October plaintiff again consulted with attorneys. She then filed her complaint in state court on November 27, 1985. On December 20, 1985, defendants removed the action to federal district court under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

I. Section 301 Preemption

Federal labor law developed under section 301 of the Labor Management Realtions Act preempts and displaces various state tort and contract claims in favor of a single federal action. Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 102-03 (1962). As a result, defendant KFH argues, that section preempts plaintiff's first four causes of action and her claim for breach of the union's duty of fair representation.

Defendant has accurately stated the position of this Circuit regarding federal preemption of these claims. Plaintiff's first cause of action for wrongful discharge is clearly preempted by § 301. Fristoe v. Reynolds Metals Co., 615 F. 2d 1209 (9th Cir. 1980); Olquin v. Inspiration Consolidated Copper Co., 740 F. 2d 1468, 1474-74 (9th Cir. 1984). Her wrongful termination claim does not state a cause of action independent of the collective bargaining agreement. Indeed, examination of the collective bargaining agreement between the union and KFH reveals express provisions which guarantee the employer will terminate only upon good cause. Defendant's Exh. 1, Art. XXIX § 201 at 47; Art. XXIX § 211 at 50.

As a result, plaintiff's collective bargaining agreement provides "the same or greater protection of job security that state tort laws seeks to provide for nonunionized employees." Olquin ,740 F. 2d at 1474.

Because the union contract grants plaintiff essentially the same job security rights that state law affords, federal preemption of these claims jeopardizes no independent state right. Harper v. San Diego Transit Corp., 764 F. 2d 663, 667-68 (9th Cir. 1985). As the Ninth Circuit noted, "In all the cases in our circuit in which preemption was found ....the collective bargaining contract provided sufficient protection against wrongful termination." Id. at 668 1/.

Case authority also specifically supports preemption of each of plaintiff's remaining claims. Plaintiff's second cause of action for fraud is plainly preempted by § 301. Fristoe, 615 F. 2d at 1209. Her cause of action against the union for breach of the duty of fair representation is similarly preempted, Harper, 764 F. 2d at 663, as are her claims for intentional and negligent infliction of emotional distress. Carter v. Smith Food King, 765 F.2d 916 (9th Cir. 1985); Olguin, 740 F. 2d at

1475-76.

Furthermore, plaintiff admits in deposition testimony that the claims for wrongful termination, fraud, intentional and negligent infliction of emotional distress, and breach of duty to represent all esentially stem from interpretations of the collective bargaining agreement. Plaintiff's Dep. 27-35, 48-49, 76-79, 80-81, 89-90, 96, 100-05, 190-110. Thus, plaintiff's tort claims arise out of the contractual breach by KFH and the breach by the union of its duty to represent the plaintiff fairly, making them "inextricably intertwined with consideration of the terms of the labor contract." Allis-Chalmers Corp. v. Lueck, 471 U.S. ___, 105 S. Ct. 1904, 1912 (1985); see also Carter, 756 F.2d at 917. As such, these claims are jointly preempted by § 301 and must be consolidated into a single cause of action under state section if they are to survive.

This court further hesitates to apply the doctrine of equitable estoppel in plaintiff's case because of the overlap and confusion between the principles of equitable tolling and equitable estoppel that Mr. DeMello's representation evokes. Mr. DeMello's statement-- if actually made and reasonably relied upon--estops at most Local 250's assertion of the statute of limitations; it cannot be used to estop defendant KFH from asserting the six-month time bar. There is some case authority in other circuits supporting the proposition that reasonable reliance upon misinformation from third parties may equitably toll the statute of limitations. <u>See</u> <u>Abbott</u>, 439 F. Supp. 643; <u>Jarrell v. United States Postal Service</u>, 753 F. 2d 1088 (D.C. Cir. 1985) (justifiable reliance upon misinformation from an EEOC counselor excused plaintiff's

noncompliance with time requirements in a Title VII action). However, these are not § 301 cases and this is too fine a filament upon which to rest plaintiff's plea for equitable estoppel in reference to defendant KFH.

For these reasons the court must reject plaintiff's argument and dismiss as barred by the statute of limitations her causes of action consolidated under § 301, namely her claims for wrongful termination, fraud, negligent and intentional infliction of emotional distress, and breach of the duty of fair representation. Accordingly, these claims are dismissed.

III. Plaintiff's Discrimination Claim

In exercising its pendant jurisdiction over plaintiff's discrimination claims under the California Fair Employment and Housing Act, this court finds the charges without merit. Cal. Gov't Code §12900 *et. seq.* First, plaintiff must exhaust her administrative

remedies as required under the FEHA before filing a civil action. Cal. Gov't Code § 12965(b); *Commodore Homes Systems, Inc. v. Superior Court*, 32 Cal.3d 211, 214 (1982). The discrimination charge plaintiff filed with the Department of Fair Employment and Housing alleges only national origin discrimination and does not include any reference to sex and age discrimination either in the specific spaces provided for this designation or in the body of the charge. Therefore, plaintiff has not exhausted her state administrative remedies in regard to age and sex discrimination, and these charges are dismissed.

Because the FEHA has anti-discrimination objectives and public policy purposes identical to Title VII, plaintiff's cause of action based on her Greek national origin may be analyzed under federal case law interpreting Title VII of the Federal Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq*; *County of Alameda v. Fair Employment and Housing Commission*, 153

Cal. App. 3d 499, 504 (1984). To survive defendant's motion for summary judgment then, plaintiff must establish a prima facie case of discrimination as defined by the test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This is, plaintiff must present evidence sufficient to support a reasonable inference of discriminatory conduct on the part of defendant KFH. To satisfy this evidentiary burden, plaintiff alleges that over a year or two before her termination, her supervisor said that she did not "know the English language." Plaintiff's Dep. at 68-73. Plaintiff has supplied no further evidence of discrimination against her on the basis of her Greek national origin. This evidence can not satisfy the evidentiary burden required to overcome defendant's summary judgment challenge on this issue. First, there is a discrepancy between one's national origin as a Greek and verbal deficiencies in English so that plaintiff's status as an non-English speaking person

and her status as a Greek-American, though obviously related, are not necessarily linked in such a way that her supervisor's remarks are probative evidence of discriminatory intent or conduct.

Secondly, even if these remarks are considered relevant, federal case law indicates that derogatory ethnic statements made in isolation from other evidentiary indicators of discriminatory intent are insufficient to establish a prima facie case of national origin discrimination. See Cariddi v. Kansas Chiefs Football Club, 568 F.2d 87, 88 (8th Cir. 1977) (a supervisor's derogatory ethnic comments regarding plaintiff's Italian-American origin did not amount to a violation of Title VII). See also Hill v. K-Mart Corp., 699 F.2d 776 (5th Cir. 1983) (isolated racial remarks insufficient to demonstrate pattern and practice of intentional discrimination).

For the foregoing reasons, the court finds plaintiff has failed to make a prima facie case of national origin discrimination and thus the court grants defendant's motion for summary judgment on the discrimination claim.

In summary, IT IS ORDERED that defendant KAISER FOUNDATION HOSPITALS, THE PERMANENTE GROUP, INC.'S motion for summary judgment on claims one, two, three, and four is GRANTED.

IT IS FURTHER ORDERED that defendant HOSPITAL & INSTITUTIONAL WORKERS UNION, LOCAL 250's motion to dismiss on claim six is GRANTED.

DATED: JULY 10, 1986 ____________________________

Marilyn Hall Patel, United
States District Judge

FOOTNOTES

1. Plaintiff's reliance on *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985) to shield her wrongful termination claim from federal preemption is misplaced. In *Garibaldi*, a wrongful termination suit survived federal preemption largely because plaintiff's termination was in violation of state public policy. *Id.* (Employee-plaintiff was fired for "whistle blowing" about employer's delivery of adulterated milk in violation of California state law.) However, plaintiff Stallcop asserts no comparable public policy considerations which might surmount federal preemption , thus making *Garibaldi* inappropriate support for her argument.